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No. _____

IN THE

Supreme Court of the United States

October Term, 1984

PITTSBURGH BUILDING CONSTRUCTION INDUSTRY ADMINISTRATIVE COMMITTEE FOR RESEARCH, EDUCATION AND TRAINING, INC.,
Petitioner,

v.

U. S. DEPARTMENT OF LABOR,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

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QUESTIONS PRESENTED

1. In holding that the statute of limitations set forth in 28 U.S.C. § 2415 did not bar the Department of Labor's claim on a contract, even though the Department took absolutely no action on the contract for eight years after completing a final audit and close-out, did the Court of Appeals contradict earlier interpretations of that statute by the former Court of Claims and other lower federal courts?

2. Alternatively, in holding that the statute of limitations was tolled during the eight-year hiatus, did the Court of Appeals contradict established precedent, including *S&E Contractors, Inc. v. United States*, 406 U.S. 1 (1972), obligating governmental agencies to pursue administrative remedies in a timely fashion?[1]

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1. There are no other parties in this case other than those on the caption. Petitioner has no parent corporation, subsidiaries, or affiliates.

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v.

U. S. DEPARTMENT OF LABOR,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

OPINIONS BELOW

The decision of the Court of Appeals is not reported and appears as Appendix A hereto (pp.1a-4a). The decision of the United States Department of Labor Board of Contract Appeals is not reported and appears as Appendix B hereto (pp. 5a-16a).

STATEMENT OF JURISDICTION

The judgment (Appendix C, pg. 17a) and decision of the Court of Appeals was entered on August 3, 1984; the order of the Court of Appeals denying the Petitioner's suggestion for rehearing in banc was entered on August 31, 1984 (Appendix D, pg. 18a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

This case involves 28 U.S.C. § 2415, Pub. L 89-505, 80 Stat. 304 (1966), Time For Commencing Actions Brought By The United States. The pertinent text is set forth in Appendix E at pg. 19a.

STATEMENT OF THE CASE[2]

Petitioner Pittsburgh Building Construction Industry Administrative Committee for Research, Education and Training, Inc. ("Pittsburgh Plan") entered into a contract with the United States Department of Labor ("DOL") for the period from November 1, 1970 through January 21, 1972 ("Contract").[3]

In 1971, the Manpower Administration of the DOL, acting at the request of Pennsylvania Congressman William S. Moorhead, conducted an audit of the Contract.

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2. References to the record below are omitted.

3. The Pittsburgh Plan is a non-profit corporation. It was formed in 1970 in the aftermath of protests and riots in 1969-1970 spawned in part by the lack of minority participation in the construction industry in Pittsburgh, Pennsylvania. Its sole purpose is, and has been, to foster the training of minorities for entry into the construction industry in Western Pennsylvania.

An Administrative Committee, composed of industry members, union representatives and minorities, was organized and the Pittsburgh Plan was incorporated under its auspices. Along with the Pittsburgh Plan, the program was comprised of the following organizations: Community Action Pittsburgh; Bidwell Cultural and Training Center, Inc.; Operation Dig; and Opportunities Industrialization Center. Each organization participated in and was a part of the Contract.

The audit, which was finalized on October 1, 1971, covered the expenditure of $200,056.00 (up to the time of the audit) of the total Contract amount of $471,255.00. The DOL concluded in this audit that there was no indication of any misappropriation or misuse of funds. In 1973, after the completion of the Contract, another audit was conducted by the DOL Office of Program Review and Audit and, in an audit exceptions report released on *May 17, 1973*, $150,073.00 in Contract costs were questioned.[4]

On May 25, 1973, Joseph K. Rodgers was designated the DOL Government Authorized Representative for the Pittsburgh Plan. Rodgers prepared a document, in preliminary form and later in final form, relating to the questioned costs, and Rodgers indicated that he had submitted the document to his superiors.

With respect to the questioned costs, the Rodgers document specifically concluded:

> In making a decision relative to resolving this matter the contracting officer analyzed all the mate-

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4. Under the special provisions of the Contract, Community Action Pittsburgh and not the Pittsburgh Plan was to be held responsible for all financial coordination involving the subcontract program. The Pittsburgh Plan received only $21,000.00 under the Contract from the DOL while Community Action Pittsburgh, for its responsibilities in financial coordination, received $70,590.00. The three minority training subcontractors each received $126,555.00.

The questioned costs in the May 17, 1973 audit included the total funds ($126,555.00) made available by the DOL to Operation Dig, one of the three minority subcontractors. Operation Dig, in turn, had subcontracted its work to M. D. Company, Inc. The basis of the questioned costs was *not* an affirmative determination of irregularities shown by an examination of the records of M. D. Company, but merely that those records were not available for audit.

> rial as well as consider[ed] the times under which this contract became a reality. *Therefore, it is in the best interest of the Federal Government that the Pittsburgh Building Construction Industry Administrative Committee [Pittsburgh Plan] for Research, Education and Training, Inc., be relieved of any financial responsibility for this audit and that all cost have [sic] been accepted as set forth in close out for Contract 42-1-0305-000.*

After the DOL submitted this document in May 1973 to the Pittsburgh Plan, it took absolutely no further action on the Contract for more than eight years.

On July 10, 1981, a DOL contracting officer issued a preliminary determination against the Pittsburgh Plan disallowing $146,189.00 of the $150,073.00 in costs questioned in the May 17, 1973 audit report. A final determination was issued on August 21, 1981, affirming this preliminary determination.[5]

The Pittsburgh Plan appealed the final determination of the contracting officer to the United States Department of Labor Board of Contract Appeals ("Board") on September 15, 1981. A Hearing was held on December 7, 1982 before Administrative Law Judge Glenn Robert Lawrence. In its decision, rendered on June 23, 1983, the Board held that the Pittsburgh Plan was liable in the

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5. Even though the DOL had continued to fund the Pittsburgh Plan on other contracts, these 1981 determinations were the first indications received by the Pittsburgh Plan since May 17, 1973, that the DOL was questioning the Contract. In addition, M. D. Company, the subcontractor of Operation Dig and one of the community agencies involved in the program, filed a petition in bankruptcy in 1973. The M. D. Company bankruptcy estate was closed in 1977.

amount of $145,743.95.[6] The Pittsburgh Plan filed a notice of appeal to the United States Court of Appeals for the Federal Circuit. Jurisdiction was based on the Contract Disputes Act of 1978, 41 U.S.C. § 601 *et seq.*

Affirming *per curiam*, the Court of Appeals delivered what it correctly described as the "probable death sentence" of the Pittsburgh Plan. Appendix A at pg. 4a. According to the Court, "section 2415 [28 U.S.C. § 2415] does not apply to actions brought before administrative boards." Appendix A at pg. 4a. The Court did not address the Pittsburgh Plan's contention that the DOL may not unilaterally delay the commencement or exhaustion of the administrative process and, thereby, delay the running of the limitations period.[7] The Pittsburgh Plan's suggestion for rehearing in banc was also denied.

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6. The Board upheld the mass exception of costs budgeted to Operation Dig/M.D. Company in spite of unrebutted evidence that a significant portion of the Contract had been performed and that, indeed, M.D. Company accomplished more than any of the other two subcontracting agencies and in spite of evidence that the records of M.D. Company had been reconstructed by the Pittsburgh Plan's accountants and had been available for review by the DOL. Without any testimony or additional explanation, the DOL merely introduced the contracting officer's appeal file. However, the DOL failed to present evidence to the Board to show that the specific costs in question were properly disallowed, that the Pittsburgh Plan was negligent under the Contract, or that the Contract itself had not been performed. Appendix B, pp. 5a-16a.

7. The Court of Appeals' decision also did not consider the Pittsburgh Plan's contentions that the Board misallocated the respective burdens of proof with respect to the disallowed costs, that the DOL simply did not meet its burden of proof, and that, even if the burden of proof were to have been deemed to rest on the Pittsburgh Plan, that burden was met. The Court of Appeals rejected the Pittsburgh Plan's arguments that the relevant contractual language was ambiguous, did not impose absolute liability on the Pittsburgh Plan, and did not place the burden of responsibility for financial coordination on the Pittsburgh Plan. Appendix A, pp. 1a-4a.

REASONS FOR GRANTING THE WRIT

The Pittsburgh Plan seeks certiorari because the opinion of the Court of Appeals (1) conflicts with earlier interpretations of 28 U.S.C. § 2415 by the federal courts, including the former Court of Claims, (2) so far departs from the accepted and usual course of judicial proceedings as to call for exercise of the Court's power of supervision, and (3) decides an important question of federal law in a way in conflict with at least one decision of this Court.

First, regardless of whether administrative proceedings are pending, prevailing case law makes clear that the six-year limitations period in 28 U.S.C. § 2415(a), the applicable statute in this case, begins to run whenever the Government acquires a cause of action.[8] For instance, in *United States v. D. H. Dave, Inc.*, 424 F. Supp. 424 (D. Md. 1976), the court specifically rejected the Government's argument that the right of action for purposes of Section 2415(a) accrues on the date of the final administrative action.

Likewise, in *United States v. Skidmore, Owings & Merrill*, 505 F. Supp. 1101, 1105 (S.D. N.Y. 1981), the court also held that the six-year period in Section 2415(a) begins to run during the pendency of administrative proceedings, and further determined that "[t]o hold that a cause of action for breach of contract does not arise until a final administrative decision fixes liability would read the one-year provision out of the statute; it would convert what, as the legislative history clearly shows, was intended as a one-year tolling provision, into an accrual

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8. Under 28 U.S.C. § 2415(a), the DOL must initiate an action based upon a contract within six years or within one year after final decisions have been rendered in applicable administrative proceedings.

date, so that the six-year limitation period commenced at that time."

In the instant case, for purposes of the running of the six-year limitations period in Section 2415(a), the DOL's right of action with respect to its claim on the Contract accrued on May 17, 1973, the date of the final audit on the Contract wherein $150,037.00 in costs were questioned. At that time, the Contract had expired, performance had been completed, payment had been made, and the respondent had become aware of the Pittsburgh Plan's alleged breach. *Accord United States v. D. H. Dave, supra; United States v. Skidmore, Owings & Merrill, supra.*

The respondent did *not* file a complaint for the recovery of costs on the Contract *within six years* after its right of action first accrued; indeed, it waited more than *eight* years to do so. Accordingly, the DOL's claim for the costs disallowed in the May 17, 1973 audit is time-barred on its face under the six-year limitations period in Section 2415 and, with respect, the Court of Appeals clearly erred in not so holding.

The only remaining question is whether the DOL's claim for the disallowed costs is saved by the one-year tolling provision in Section 2415(a). In this case, a final decision was rendered in an applicable administrative proceeding when, in 1973, the DOL submitted the Rodgers document to the Pittsburgh Plan. That document concluded that the Pittsburgh Plan was relieved of any financial responsibility for the May 1973 audit and that all costs had been accepted. But, because the DOL did *not* file a Complaint for the recovery of costs on the Contract *within one year* of the submission of the Rodgers document, any claim which the DOL might have had is now time-barred. The Pittsburgh Plan respectfully

submits that the Court of Appeals committed error in not so holding.

To the extent that the applicable date for purposes of the running of the one-year limitations period in Section 2415(a) could be held to be not May 1973, but rather a later date such as the 1981 determination of the contracting officer or the decision of the Board of Contract Appeals, the DOL's claim should still have been found to be barred.

The purpose of the one year tolling provision in Section 2415(a) is as follows:

> This last provision, which has the effect of tolling the running of the statute of limitations during mandatory administrative proceedings, is necessary because of the great number and variety of such proceedings made possible by current statutes. An administrative proceeding ordinarily consumes a considerable period of time and, as has been noted, *the bill would permit the Government a year after the final administrative decision in which to present its case for judicial determination.* (Emphasis added).

S. Rep. No. 1328, 89th Cong., 2d Sess. 3, *reprinted in* [1966] U.S. Code Cong. & Ad. News 2502, 2504. Such purpose is not met when the DOL unilaterally postpones the applicable administrative proceedings and thereby delays the running of the limitations period.

The decision of the United States Court of Claims in *Zinger Construction Co. v. United States*, No. 122-82C (Ct. Cl. August 27, 1982) is dispositive on this point.

In *Zinger*, added costs were disallowed though a contracting officer never made a "final" decision. Ten years later, the plaintiff appealed to the Board of Contract

Appeals, which denied the claim. On appeal to the Court of Claims, the Court held that the action was time-barred. The Court of Claims *rejected* the argument that the statute of limitations does not begin to run until the Board rendered its decision. *The Court ruled that a party may not unduly extend the limitations period by unilaterally postponing the commencement of the administrative process.* Citing *Nager Electric Co. v. United States*, 368 F.2d 847, 864 (Ct. Cl. 1966), the Court held that a party "is not left at large to present his claim administratively whenever he likes." Slip op. at 3. Though the contracting officer had not made a "final" decision, the Court nonetheless determined that "the plaintiff certainly treated it as such—until it suited plaintiff otherwise, 10 years later." Slip op. at 4.

Likewise, in the instant case, the DOL, after submitting the Rodgers document, took absolutely no further action on the Contract until 1981. The DOL here, like the plaintiff in *Zinger*, made no effort to pursue its claim (founded on the May 17, 1973 audit) for in excess of eight years. The DOL, like the plaintiff in *Zinger*, treated the 1973 Rodgers document as final until it suited it otherwise—eight years later.

The DOL never offered *any* explanation for its eight-year silence, and the attempt to delay for eight years what is claimed to be the applicable administrative process was soundly rejected in *Zinger*. Yet, the Court of Appeals in this case did not discuss *Zinger* and did not explain why the DOL should be permitted to delay any and all action for in excess of eight years.

Although an administrative proceeding may consume a considerable period of time and, indeed, the policy underlying the one-year savings period in Section 2415(a) is addressed to accommodate precisely that fact,

such policy has no applicability in situations such as the instant case where the Government takes absolutely no action for a lengthy period of time.

Further support for the Pittsburgh Plan's position is found in the legislative history which iterates and reiterates that the purpose of Section 2415(a) is to increase fairness to private litigants dealing with the Government. "The emphasis on fairness . . . is a very important consideration and the principal basis for this bill." U.S. Code Cong. & Ad. News at 2508. Under the bill, "private litigants can be assured of a more fair and balanced treatment when dealing with the Government." *Id.* at 2503.[9] To permit the Government to suspend indefinitely any administrative proceedings is inconsistent with the spirit of the bill and is simply not just.

Yet the Government frequently postpones the commencement of the administrative process and thereby tolls, sometimes indefinitely, the limitations period in Section 2415. *SER-Jobs For Progress, Inc.*, 84-1 CCH BCA ¶ 17,158 (1984) (no action taken by Government for 6½ years after an audit); *World Wide Tankers, Inc.*, 77-1 CCH BCA ¶ 12,302 (1976) (no action taken by government on contract for a period of nine years). In these cases, as in the instant case, the Government's inaction has resulted in vexatious, expensive, and ruinous litigation.

Applicable case law and principles support the Pittsburgh Plan's position that the respondent's inaction

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9. Also, in the legislative history:

> The committee feels that the prompt resolution of the matters covered by the bill is necessary to an orderly and fair administration of justice. Stale claims can neither be effectively presented nor adjudicated in a manner which is fair to the parties involved.

Id.

in this and like cases should not be sanctioned by the federal courts. For instance, it is "the Government's obligation, not the contractor's, to see that a proper 'final decision' is rendered once a claim has been tendered." *Manpower, Inc. of Tidewater v. United States*, 513 F.2d 1396, 1397-1398 (Ct. Cl. 1975). Indeed, it is well settled that, under the disputes clause of a government contract, the Government has an implied obligation to render a timely decision. In the *Manpower* case, there was a two-year delay after the claim was made and the court held that "[a] contractor is not required to press the Government agency to decide his claim. It is the defendant's obligation to take that step in reasonable time." *Id.* at 1398.

As succinctly stated by this Court in *S&E Contractors, Inc. v. United States*, 406 U.S. 1, 8 (1972), the Government has an implied covenant to render a timely decision and such covenant is breached by a lengthy delay:

> The disputes clause included in Government contracts is intended, absent fraud or bad faith, to provide a quick and efficient administrative remedy and to avoid 'vexatious and expensive and, to the contractor oftentimes, ruinous litigation' . . . .
>
> The result in some cases might be sheer disaster. In the present case *nearly a decade has passed* since petitioner completed the performance of a contract under which the only agency empowered to act determined that it was entitled to payment. To postpone payment for such a period is to sanction precisely the sort of 'vexatious litigation' which the disputes process was designed to avoid. (Citation omitted) (Emphasis added).

Further, a claim may be barred regardless of any limitations period. In *Lane v. United States*, 639 F.2d 758, 761 (Ct. Cl 1981), the Government argued that it was entitled to all the time allowed it by Section 2415 on its claim. The Court rejected this contention and held: "The linkage of laches to limitations is a false one. The doctrine of laches is kept alive for the very purpose that statutes of limitations alone will not avert the prejudicial exploitation of delay in some circumstances."[10] Even though the statute of limitations had not yet expired, the Government's claim was barred.

In the instant case, the delay has been prejudicial to the Pittsburgh Plan. The eight year gap has resulted in the loss of vital records and the loss of any recourse against M. D. Company. This is a classic case of a stale claim which, after the passage of eight years, was not and cannot be adjudicated in a manner which was fair to the parties involved.

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10. In *Deering v. United States*, 620 F.2d 242, 244 (Ct. Cl. 1980), the court noted that "[a]s an equitable defense, laches is applied apart from, and irrespective of, statutes of limitations." (Emphasis omitted). *Quoting Brundage v. United States*, 504 F.2d 1382, 1384 (Ct. Cl. 1974), *cert. denied* 421 U.S. 998 (1975).

CONCLUSION

The Pittsburgh Plan has been given a "probable death sentence" which it does not deserve and which is contrary to law. Nothing in the 1973 audit or 1981 decision accused it of any wrongdoing or even negligence.

In reaching its result, the Court of Appeals not only did not address the fundamental injustice of the DOL's eight-year delay in this case, but it also did not follow the clear precedent and teachings of the cases cited herein. Further, the Court of Appeals' holding deprives, absolutely and totally, the Pittsburgh Plan of any recourse for the DOL's eight-year delay and has, with respect, sanctioned an injustice which is directly contrary to Supreme Court and federal court precedent. Accordingly, a writ of certiorari should issue to review the order and decision of the Court of Appeals for the Federal Circuit.

Respectfully submitted,

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Dated: November 29, 1984

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

CIVIL ACTION NO. 84-588

Filed: August 3, 1984

PITTSBURGH BUILDING CONSTRUCTION INDUSTRY ADMINISTRATIVE COMMITTEE FOR RESEARCH, EDUCATION AND TRAINING, INC.,

Appellant,

v.

U. S. DEPARTMENT OF LABOR,

Appellee.

DECISION

This is an appeal from a decision of the United States Department of Labor Board of Contract Appeals (DOLBCA), 82-BCA-6, (July 27, 1983), which upheld a cost-reimbursement disallowance to appellant. We *affirm.*

On February 9, 1971, the Department of Labor (DOL) and the Pittsburgh Building Construction Industry Administrative Committee for Research, Education and Training, Inc. (contractor or appellant) entered into a contract under which appellant would recruit and train pre-apprenticeship and advanced trainees in the construction trades at a total estimated cost of $471,255. Appellant is a nonprofit corporation created to introduce more minority participants into the construction industry. In part, Clause 6 of the General Provisions of the contract provided:

> (a) The contractor shall maintain books, records, documents, and other evidence and accounting procedures and practices, sufficient to reflect properly all direct and indirect costs of whatever nature claimed to have been incurred and anticipated to be incurred for the performance of this contract.

A government audit report of the project dated May 17, 1973, questioned costs of $150,073 claimed to have been expended by M. D. Company, one of appellant's sub-subcontractors. The auditor reported that M. D.'s books were "[i]nauditable." As a result of the contractor's inability to substantiate M. D.'s costs through its own financial records pursuant to Clause 6, the contracting officer disallowed reimbursement to the contractor of $146,189 of those questioned costs. On the contractor's appeal, the DOLBCA upheld the contracting officer's disallowance.

Appellant makes various contentions, namely, that a DOL official approved M. D. Company's costs and therefore the DOL is now estopped from disallowing them; that Clause 6 of the contract is ambiguous and does not clearly impose upon the contractor the obligation to monitor and account for the costs of its sub-subcontractor; that there is no privity of contract between appellant and M. D. and thus appellant cannot be held responsible for M. D.'s nonfeasance; that the government is barred from bringing this action by the 6-year limitation of 28 U.S.C. § 2415; and, that imposing liability on appellant, a nonprofit affirmative action organization, for the failures of its sub-subcontractor would constitute an unfair and unjust burden.

Despite appellant's able presentation, we find that the DOLBCA had sufficient evidence to find the contrary to each of these contentions. We address them *seriatim.*

First, appellant contends that a DOL official, Mr. Rogers, somehow modified the contract, or released or waived the government's ability to question the M. D. costs when he contributed to an unsigned draft that acknowledged M. D.'s charges. The DOLBCA correctly noted that this was an unsigned, unfinished draft, and therefore, entitled to no legal weight. But even if such a document had been properly executed and accepted by the parties, it would have no force, for Mr. Rogers did not have the capacity to bind the DOL in this matter. Mr. Rogers was merely serving as a DOL guidance representative, not a contracting officer. As the Supreme Court established in the case of *Federal Crop Insurance Corp. v. Merrill*, 332 U.S. 380, 384 (1947), in contracts involving the government, it is not enough that the government party appear to have authority to enter into an agreement, he must have actual authority. On either of these two grounds the DOLBCA could have found appellant's estoppel argument uncompelling.

Second, appellant argues that Clause 6 is ambiguous, that it fails to set forth clearly appellant's obligation to maintain financial records related to the sub-subcontractor's involvement in the project. We know of no language, however, that could more directly state appellant's ultimate responsibility for keeping sufficient records to document the project's costs. While the language is broad ("* * * all direct and indirect costs of whatever nature * * *"), it is not at all vague. Rather, its broadness merely describes the extensive lineaments of appellant's responsibilities.

Third, appellant argues that it should not be held responsible for the failure of its sub-subcontractor to keep efficient records because of lack of privity between them. This argument, however, seems to prove too much,

for the government, *a fortiori*, cannot be expected to bear the burdens created by a party with whom it is thrice removed from privity. In the series of contracts in this case, only one involved the government. If a party subcontracts, as did the contractor in this case, it must enforce the sub-subcontractor's observance of obligations to which the contractor is bound under the primary contract. Appellant simply failed to do so. *See Erickson Air Crane Co. of Washington, Inc.* v. *United States*, 731 F.2d 810, 813 (Fed. Cir. 1984); *Severin* v. *United States*, 99 Ct. Cl. 435, 442-43 (1943), *cert. denied*, 322 U.S. 733 (1944).

Fourth, appellant argues that the government's claim is barred by 28 U.S.C. § 2415's 6-year time limit. This is incorrect; section 2415 does not apply to actions brought before administrative boards. *See World Wide Tankers*, 77-1 BCA ¶ 12,302.

And last, appellant argues that, as a nonprofit affirmative action program, to impose upon it a probable death sentence for what it would characterize as the nonfeasance of a remote sub-subcontractor would be unfair and unjust. While this court is aware of the unfortunate position appellant may find itself in, appellant's status accords it no special legal treatment, nor can it relieve appellant of its contractual obligations. That appellant may not now be in a position to bear the consequences of its breach can be of no moment in a court of law.

APPENDIX B

U. S. DEPARTMENT OF LABOR

BOARD OF CONTRACT APPEALS

CASE NO.: 82-BCA-6

Filed: June 23, 1983

PITTSBURGH BUILDING CONSTRUCTION INDUSTRY ADMINISTRATIVE COMMITTEE FOR RESEARCH, EDUCATION AND TRAINING, INC.,

Appellant,

v.

U. S. DEPARTMENT OF LABOR,

Appellee.

DECISION OF THE BOARD

This is a timely appeal from a $146,189 audit-based cost disallowance, set out in an August 21, 1981 contracting officer's final decision. The appeal was heard December 7, 1982 in Pittsburgh, Pennsylania. Briefs and proposed findings have been received from the parties.

Findings of Fact

1. On February 9, 1971, the Department of Labor (DOL) and the Pittsburgh Building Construction Industry Administrative Committee for Research, Education and Training, Inc. (contractor or appellant) entered into the above captioned contract. The contract period (as amended) extended from November 1, 1970 through January 21, 1972 (AF, Tab C) [1]. The total estimated cost was $471,255.

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1. Reference is to Appeal File.

2. The agreement provided that the contractor recruit, tutor and train 158 pre-apprenticeship trainees and 156 advanced trainees for entrance into the building and construction trades, (AF, Tab C, Special Provision No. 1).

3. Identified sub-contractors included: Community Action Pittsburgh, Opportunities Industrialization Center Inc., Operation Dig, Bidwell Cultural and Training Center, Inc., and Construction Advancement Program of Western Pennsylvania (AF, Tab C, Special Provision No. 1).

4. Clause 6 of the Contractor's General Provisions states in part:

> (a) The Contractor shall maintain books, records, documents, and other evidence and accounting procedures and practices, sufficient to reflect properly all direct and indirect costs of whatever nature claimed to have been incurred and anticipated to be incurred for the performance of this contract.

5. On July 10, 1981, by a document setting out findings and determinations, the Contracting Officer disallowed $146,189 of the $150,073 in costs questioned by the Government audit report dated May 17, 1973 (AF, Tab 8, A, Item A.6 and A.7).

6. On July 29, 1981, the contractor responded to the initial findings and determination alleging that the disallowed costs had been accepted by the U.S. Department of Labor (DOL) in a "Determination" prepared and approved by Joseph K. Rogers, a Government Authorized Representative (GAR) (AF, Tab A, Item A.5, p.1).

7. On August 21, 1981, the Contracting Officer issued a final decision which affirmed the findings of his prior determination (AF, Tab A, Item A.2 and A.3).

8. On September 15, 1981 the contractor timely appealed the final decision (AF, Tab A, Item A.1, p.3).

Discussion and Conclusions

1. The Contractor's primary argument is that all of the disallowed costs were in effect waived or released by a memorandum allegedly prepared by Joseph K. Rodgers, a GAR. Additionally, the contractor argues that the Government's claims are barred by 28 U.S.C. Sec. 2415, as they were filed untimely, *i.e.* more than the 6 years allowed by the statute of limitations. On at least two grounds the primary argument is flawed.

Firstly, the document upon which the contractor relies (AF, A5-25; Exhibit A1) is an unsigned draft, not in final form and at most a "proposal".

Secondly, even if it were in the form of a properly executed contract modification, release or waiver, the record demonstrates that Rodgers as GAR had no authority to sign such documents. At most he was authorized to recommend audit dispute resolutions. In that regard the letter to the contractor, dated May 25, 1973 (G. 1), specifically limits the GAR as follows:

> "In the event an audit exception is taken" (he may) "investigate the exceptions, *recommend* a solution to the contracting officer, ..." (emphasis supplied)

This statement negates the notion that he may, by himself, authorize waivers or releases. As persuasively argued by the Government, lack of such authority prevents recovery by a contractor. See *Federal Corp. Ins. Corp.* v. *Merrill*, 332 U.S. 380 (1947). Further it is noted that

Rodgers did not prepare the alleged release document and at most contributed some of the recommendations contained therein (T. 82, 83).

2. *The Disallowed Items*

What follows are: the disallowed items from the August 20, 1981 contracting officer's final decision; the contractor's response (A 5),[2]; the Board's conclusions.

SCHEDULE C-1

1) *FINDINGS:* Wages of $2,700 and fringe benefits of $141 were questioned because these costs represented charges in excess of the approved budget amounts. These costs were incurred by the following subcontractors:

Name	Salaries	Fringe Benefits	
a) Bidwell Cultural & Training Center:			
Roderick Jackson	$ 757	$ 40	
John Laster	252	13	
b) Opportunities Industrialization Center, Inc.:			
Barbara Ramsey	196	10	
John Gilbert	597	31	
Robert Nickles	348	18	
William Thompson	550	29	(NOTE)
Totals	$2,700	$141	

(NOTE): The amount questioned per audit report was $14. An additional $15 is being questioned as follows:

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2. Inasmuch as McGruder testified to his involvement in the preparation of Exhibit A 5, the claims are considered on their merits (T 33).

Applicable Salary Questioned	
Employer's share of FICA rate per audit report	$550
Fringe Benefits Applicable	.052
Amount Questioned by Auditors	$29
Difference	(14)
	$15

Special provision 5, *Flexibility of costs*, of the contract states in part " . . . no change shall be made in any of the wages or fringe benefits . . . " There were no modifications approving such changes.

Determination: Wages of $2,700 and related fringe benefits of $141 are disallowed since the contractor did not comply with the special provisions contained in the contract agreement.

Contractor's Argument: In essence, the contractor says that because of their seniority, both Jackson and Lassiter were entitled to a raise. A further argument is that the coodinator Mr. Ellis McGruder and Mr. Roger Coyne were on notice that the named individuals were given raises and did not object. Respecting Ramsey, Gilbert and Thompson, it is contended that approval was obtained for the overpayment, however ETA mistakenly failed to execute modifications. Lastly the overpayment for Nickles, it is argued, is an outgrowth of a job title change to counsellor from recruiter. The Nickles payment is further justified based on his essential assistance in revising and updating the curriculum used for training.

Conclusion: The change of Nickles' job title does not justify the unauthorized payment to him. Respecting the other expenditures in excess of the contractual limits,

there are allusions to mistakes by Employment Training Administration (ETA) and its alleged failure to execute modifications. If ETA failed in that manner, it may be assumed it was an intentional decision on their part not to allow excess amounts. Further, if the contractor wishes to reward employees based on seniority, it does so on its own initiative and such payments are not a compensable cost unless supported by a contract modification. Accordingly, appellant's argument is considered without substance and the disallowances are affirmed.

SCHEDULE C-2

2) *FINDINGS:* wages and fringe benefits were questioned because they represent compensation for unauthorized positions and in excess of the budget. The costs were incurred by the following subcontractors:

Name	Wages	Fringe Benefits
a) Bidwell Cultural & Training, Inc. Richard Saunders	$ 423	22
b) Opportunities Industrialization Center; Inc.:		
Pratheaus Land	1,887	98
Delores Mann	920	48
Total	$2,430	$168

Determination: The wages and related fringe benefits of $168 are disallowed since the services were not included in the approved budget for this contract.

Contractor Argument: Richard Saunders was paid $445.05 to handle a crisis situation developing with the trainees Land and Mann who were employed as custodians. Reference is also made to modifications supporting payment to the custodians.

Conclusion: There is justification for payment of Saunders and the $445.05 is allowed. Modifications in support of the other payments have not been located. Therefore, the disallowance of those items is affirmed.

SCHEDULE C-3

3) *FINDINGS:* Salaries of $1,191 and related fringe benefits of $62 paid to Curtis Johnson were questioned since he was a part time employee drawing full time wages. The salary questioned was pro-rated based on a normal 80 man hour payroll period as follows:

Salary 11/6/70—7/16/71	$2,978
Time not expended on contract (32 hours)	40%
Salary Questioned	$1,191
Plus: Employer's share of FICA	5.2%
Fringe Benefits Questioned	$ 62

Special provisions 2 of this contract states in part "... all employees under this contract are required to devote full time to the operation of this contract..."

Determination: Salaries of $1,191 and related fringe benefits of $62 are disallowed inasmuch as they represent charges for which no services were provided and further violate the cited Special provisons of the contract.

Contractor argument: All of the contractor employees argeed that Jackson was only a "part timer" employee and such arrangements were common knowledge.

Conclusion: The contract language is explicit. There was no justification provided for part-time employment. The item is disallowed.

SCHEDULE C-4

4) *FINDINGS:* Wages of $80 and related fringe benefits of $4 paid to Pratheaus Land were questioned because of a duplicate adjustments made to his pay for the period ending 7/23/71.

Determination: Wages of $80 and related fringe benefits of $4 are disallowed.

Contractor Argument The contractor made an "honest" mistake and overpaid Land $84.

Conclusion A mistake does not relieve the contractor even if "honest". The disallowance is affirmed.

SCHEDULE C-5

5) *FINDINGS:* Operational costs of $4,946 were questioned because the costs claimed exceeded the amounts recorded in the general ledger by this amount. These costs were incurred:

Subcontractor	Amount Questioned
Administrative Committee for R.E. & T., Inc.	$ 958
Bidwell Cultural and Training Center	3,988
Total	$4,946

Contractor Argument: There is documentation to justify the payments.

Conclusion: The documentation referred to has not been furnished by the contractor. The disallowance is affirmed.

SCHEDULE C-6

6) *FINDINGS:* Operational costs of $1,757 were questioned due to lack of supporting documentation. The

two subcontractors who failed to document all the costs claimed on the final invoice are as follows:

Subcontractor	Amount
Administrative Committee for R.E. & T., Inc.	$ 674
Opportunities Industrialization Center, Inc.	1,083
Total	$1,757

Determination: Costs of $1,757 are disallowed since the amount claimed was not supported by proper documentation.

Contractor's Argument: Documentation supports the expenses.

Conclusions: No documentation has been found in this record. The disallowance is affirmed.

SCHEDULE C-7

FINDINGS: Operational costs of $5,355 were questioned since two contractors incurred costs not authorized in the approved budget. These costs were incurred:

Administrative Committee for R.E. & T., Inc.	
Interest Expense	$1,088
Legal Fees	704
Opportunities Industrialization Center, Inc.	
Promotional Materials and Advertising	375
Orientation Supplies	1,100
Testing and Evaluation Fees	2,088
Total	$5,355

Determination: Costs of $5,355 are disallowed due to lack of proper documentation.

Contractors argument: These expenses were all allowed by the contracting officer.

Conclusion: There is no evidence indicating contracting officer approval. The disallowance is affirmed.

SCHEDULE C-8

8) *FINDINGS:* Total costs charged by the M.D. Company (Operation Dig) of $126,555 were questioned because their accounting records were unauditable. The following irregularities and inconsistencies were noted:

a. 27% of the time and attendance reports necessary to support salary payments were missing. None of the time and attendance reports made available were signed by the employees as required.

b. A review of in-house correspondence, memoranda and personnel files indicated that many Phase I staff members held positions and/or performed job functions for other divisions of the M.D. Company. It was noted that 18 of the 29 individuals employed full time under the terms of the sub-contract performed tasks for other M.D. Company affiliates.

c. Four staff members employed full time under the subcontract were also enrolled in an OJT program. These employee's salaries were charged to funds authorized under this sub-contract whereas the M.D. Company received reimbursements from the OJT program for training the same four staff members for other positions.

d. Two staff members employed as full time recruiters under the M.D. Company subcontract were enrolled in a Commonwealth of Pennsylvania JOBS program. These employees' salaries were charged to this subcontract even though the M.D. Company received reimbursements from the Commonwealth for training the same two individuals as secretaries.

As of the date of this decision, the M.D. Company has been declared bankrupt. The contractor, however, is the party bearing primary responsibility for the overall operation and performance of its subcontracts.

Determination: Total costs of $126,555 were disallowed since the contractor is responsible for the actions of its subcontractors.

Contractor's argument: All records have been accepted by the bankruptcy court as adequate. They should therefore also be accepted by the Contracting Officer.

Conclusion: There is no evidence in this record as to what the bankruptcy court determined. It was the contractor's burden to present such evidence in support of its contentions. Having failed to do so, the contractor's argument stands unproven and the Board is unable to accord it any weight.

Further, the contractor may not avoid its responsibility by contending that acts of its sub-contractor rather than its own that occasioned the disallowance. When the sub-contractor failed to keep proper records of funds disbursed under the contract, it is the appellant that must assume any loss caused thereby. To rule otherwise would be to ignore the fact that it was the contractor's duty to enforce the subcontractor's observance of its obligations and that the Government was not a party to the subcontract arrangement. *Severin v. United States*, 99 Ct. Cl. 435 (1943). Based on the foregoing, the disallowance is affirmed.

The argument that the Government is barred from bringing the claim by the statute of limitations is without merit. *World Wide Tankers*, ASBCA No. 20903, 77-1 BCA 12,302.

Based on the foregoing the appeal is granted as to $445.05 paid Saunders (Schedule C2) and otherwise denied.

GLENN ROBERT LAWRENCE
Glenn Robert Lawrence
Administrative Law Judge
Member, U.S. Department
of Labor
Board of Contract Appeals

I concur

Absent on Official Business
Rudolf Sobernheim
Administrative Law Judge
Chairman, U.S. Department of Labor
Board of Contract Appeals

I concur

SAMUEL B. GRONER
Samuel B. Groner
Administrative Law Judge
Member, U.S. Department of Labor
Board of Contract Appeals

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

CIVIL ACTION NO. 84-588

Filed: August 3, 1984

PITTSBURGH BUILDING CONSTRUCTION INDUSTRY ADMINISTRATIVE COMMITTEE FOR RESEARCH, EDUCATION AND TRAINING, INC.,

Appellant,

v.

U. S. DEPARTMENT OF LABOR,

Appellee.

JUDGMENT

On appeal from the Department of Labor Board of Contract Appeals this cause having been heard and considered, it is ORDERED and ADJUDGED: Affirmed.

Entered by Order of the Court

s/ GEORGE E. HUTCHINSON
George E. Hutchinson, *Clerk*

Dated August 3, 1984
Suggestion for Rehearing
In Banc, Declined,
August 31, 1984.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

CIVIL ACTION NO. 84-588

Filed: August 31, 1984

PITTSBURGH BUILDING CONSTRUCTION INDUSTRY ADMINISTRATIVE COMMITTEE FOR RESEARCH, EDUCATION AND TRAINING, INC.,

Appellant,

v.

U. S. DEPARTMENT OF LABOR,

Appellee.

ORDER

A suggestion for rehearing in banc having been filed in this case,

Upon consideration thereof, it is Ordered by the court that the suggestion for rehearing in banc be, and the same is hereby, Declined.

For the Court

s/ DOROTHY I. MYERS
Dorothy I. Myers, *Chief Deputy Clerk*

August 31, 1984
Date

APPENDIX E

STATUTE INVOLVED

The pertinent provision of 28 U.S.C. § 2415, Pub. L 89-505, 80 Stat. 304 (1966), involved in this case is as follows:

> § 2415. Time for commencing actions brought by the United States
>
> (a) Subject to the provisions of section 2416 of this title, and except as otherwise provided by Congress, every action for money damages brought by the United States or an officer or agency thereof which is founded upon any contract express or implied in law or fact, shall be barred unless the complaint is filed within six years after the right of action accrues or within one year after final decisions have been rendered in applicable administrative proceedings required by contract or by law, whichever is later: *Provided*, That in the event of later partial payment or written acknowledgment of debt, the right of action shall be deemed to accrue again at the time of each such payment or acknowledgment.

* * * *